

the termination action, unless the Administrative Law Judge has consolidated the suspension appeal with the corresponding termination appeal.

§ 134.406 Review of the administrative record.

(a) Any proceeding conducted under § 134.401(a) through (d) shall be decided solely on a review of the written administrative record, except as provided in § 134.407 and in suspension appeals. For suspension appeals under § 134.401(e), see § 124.305(d) of this chapter.

(b) Except in suspension appeals, the Administrative Law Judge's review is limited to determining whether the Agency's determination is arbitrary, capricious, or contrary to law. As long as the Agency's determination is reasonable, the Administrative Law Judge must uphold it on appeal.

(c) The administrative record must contain all documents that are relevant to the determination on appeal before the Administrative Law Judge and upon which the SBA decision-maker, and those SBA officials that recommended either for or against the decision, relied. The administrative record, however, need not contain all documents pertaining to the petitioner. For example, the administrative record in a termination proceeding need not include the Participant's entire business plan file, documents pertaining to specific 8(a) contracts, or the firm's application for participation in the 8(a) BD program if they are unrelated to the termination action. The petitioner may object to the absence of a document, previously submitted to, or sent by, SBA, which the petitioner believes was erroneously omitted from the administrative record. In the absence of any objection by the petitioner or a finding by the Judge pursuant to paragraph (e) of this section that the record is insufficiently complete to decide whether the determination was arbitrary, capricious, or contrary to law, the administrative record submitted by SBA shall be deemed complete.

(d) Where the Agency files its response to the appeal petition after the date specified in § 134.206, the Administrative Law Judge may decline to con-

sider the response and base his or her decision solely on a review of the administrative record.

(e) The Administrative Law Judge may remand a case to the AA/8(a)BD (or, in the case of a denial of a request for waiver under § 124.515 of this chapter, to the Administrator) for further consideration if he or she determines that, due to the absence in the written administrative record of the reasons upon which the determination was based, the administrative record is insufficiently complete to decide whether the determination is arbitrary, capricious, or contrary to law. In the event of such a remand, the Judge will not require the SBA to supplement the administrative record other than to supply the reason or reasons for the determination and any documents submitted to, or considered by, SBA in connection with any reconsideration permitted by regulation that occurs during the remand period. After such a remand, in the event the Judge finds that the reasons upon which the determination is based are absent from any supplemented record, the Judge will find the SBA determination to be arbitrary, capricious, or contrary to law. The Administrative Law Judge may also remand a case to the AA/8(a)BD (or, in the case of a denial of a request for waiver under § 124.515 of this chapter, to the Administrator) for further consideration where it is clearly apparent from the record that SBA made an erroneous factual finding (e.g., SBA double counted an asset of an individual claiming disadvantaged status) or a mistake of law (e.g., SBA applied the wrong regulatory provision in evaluating the case). A remand under this section will be for a reasonable period.

[63 FR 35766, June 30, 1998, as amended at 67 FR 47250, July 18, 2002]

§ 134.407 Evidence beyond the record and discovery.

(a) Except in suspension appeals, the Administrative Law Judge may not admit evidence beyond the written administrative record nor permit any form of discovery unless he or she first determines that the petitioner, upon written submission, has made a substantial showing, based on credible evidence and not mere allegation, that the

Agency determination in question may have resulted from bad faith or improper behavior.

(1) Prior to any such determination, the Administrative Law Judge must permit SBA to respond in writing to any allegations of bad faith or improper behavior.

(2) Upon a determination by the Administrative Law Judge that the petitioner has made such a substantial showing, the Administrative Law Judge may permit appropriate discovery, and accept relevant evidence beyond the written administrative record, which is specifically limited to the alleged bad faith or improper behavior.

(b) A determination by the Administrative Law Judge that the required showing set forth in paragraph (a) of this section has been made does not shift the burden of proof, which continues to rest with the petitioner.

[63 FR 35766, June 30, 1998, as amended at 67 FR 47251, July 18, 2002]

§ 134.408 Summary decision.

(a) *Generally.* In any appeal under this subpart D, either party may move or cross-move for summary decision, as provided in § 134.212.

(b) *Summary decision based on fewer than all grounds.* If SBA has provided multiple grounds for the 8(a) determination being appealed, SBA may move for summary decision on one or more grounds.

(1) *Non-suspension cases.* Except in suspension appeals, if the Judge finds that there is no genuine issue of material fact as to whether SBA acted arbitrarily, capriciously, or contrary to law as to any such ground or grounds, and that the SBA is entitled to a decision in its favor as a matter of law, the Judge will grant the motion for summary decision and dismiss the appeal.

(2) *Suspension cases.* In suspension appeals, if the Judge finds that there is no genuine issue of material fact as to whether adequate evidence exists that protection of the Federal Government's interest requires suspension, as to any such ground or grounds for the proposed suspension, the SBA is entitled to a decision in its favor as a matter of law, and the Judge will grant the mo-

tion for summary decision and dismiss the appeal.

[67 FR 47251, July 18, 2002]

§ 134.409 Decision on appeal.

(a) A decision of the Administrative Law Judge under this subpart is the final agency decision, and is binding on the parties.

(b) The Administrative Law Judge shall issue a decision, insofar as practicable, within 90 days after an appeal petition is filed.

(c) The Administrative Law Judge may reconsider an appeal decision within 20 days of the decision if there is a clear showing of an error of fact or law material to the decision.

[63 FR 35766, June 30, 1998. Redesignated and amended at 67 FR 47251, July 18, 2002]

Subpart E—Rules of Practice for Appeals From Service-Disabled Veteran Owned Small Business Concern Protests

SOURCE: 70 FR 8927, Feb. 24, 2005, unless otherwise noted.

§ 134.501 What is the scope of the rules in this subpart E?

(a) The rules of practice in this subpart E apply to all appeals to OHA from formal protest determinations made by the Associate Administrator for Government Contracting (AA/GC) in connection with a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) protest relating to the status or ownership or control of the SDVO SBC, as set forth in § 125.26 of this chapter. This includes appeals from determinations by the AA/GC that the protest was premature, untimely, nonspecific, or not based upon protestable allegations.

(b) Except where inconsistent with this subpart, the provisions of Subpart A and B of this part apply to appeals listed in paragraph (a) of this section.

(c) Appeals relating to formal size determinations and NAICS Code designations are governed by Subpart C of this part.

§ 134.502 Who may appeal?

Appeals from SDVO SBC protest determinations may be filed with OHA by